STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2003
v	No. 238522 Charlevoix Circuit Court
CHARLES RAYMOND PEMBERTON, Defendant-Appellant.	LC No. 00-053109-FH

Before: Kelly, P.J., and White and Hoekstra, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent.

The Fourth Amendment protects persons against warrantless searches of the curtilage of a person's home; the curtilage may not be searched without a warrant unless some exception to the warrant requirement exists. *Oliver v United States*, 466 US 170, 178-181; 104 S Ct 1735; 80 L Ed 2d 214 (1984); *People v Rotar*, 137 Mich App 540, 546; 357 NW2d 885 (1984).

The testimony at the suppression hearing was that the two officers went to defendant's trailer home on a "knock and talk" mission, on September 14, 2000, a weekday, around 3:00 p.m. Defendant lived on Camp Ten Road in Elmira, Michigan, a rural, sparsely populated area, and his trailer home measured 12-14 feet by 50-60 feet. The police officers pulled into defendant's driveway, one went to the front door, which was just off the driveway on the trailer's eastern side, where he knocked repeatedly for two minutes and received no response. The other officer had positioned himself at the southern end of the trailer. After receiving no response, the officer that knocked at the front door joined the officer at the southern end of the trailer, saw a trail leading into the woods in a southeasterly direction, thought that defendant may be outside because it was a nice day, and the two followed the trail into the woods for about twenty or thirty yards. One of the officers testified that he was hoping to see marijuana plants as they walked down that trail, but testified "I don't call that searching." The officers heard no noises and saw nothing to indicate that defendant was outside, so they turned back up the trail and approached the back of the western side of the trailer, the opposite side of the front door, climbed onto a deck that had no steps, and knocked at the back door of the trailer, again receiving no response. There were plants in pots on the deck. The officers saw a water hose hanging out one of the trailer windows. The westerly side, "back yard" area of the trailer was unmowed, overgrown, brushy and weedy, and there were no paths through it. After receiving no response to their knocking, the officers walked back to their vehicles by a different route around the trailer, in a northerly

direction, through the overgrown, unmowed pathless area, looking in the brush and bushes that surrounded the trailer. The officers testified that while walking on this pathless route, they saw a potted marijuana plant in a cove of brush and shrubbery, and seized the plant.

The officers testified that the plant was not visible from Camp Ten Road, from defendant's front door, defendant's deck off the rear door, and not visible from defendant's driveway.

Defendant's motion to suppress argued he had an increased expectation of privacy inside the curtilage of his property, where the marijuana plant was found. Defendant conceded that when the police go to a residence they are not required to turn a blind eye to what is exposed to the general public and are allowed reasonable ingress and egress onto the curtilage of private property, but argued that in the instant case the police far exceeded that:

> In the present case, the police entered the property from a common area then deviated from their purported administrative purpose and started an illegal search of the curtilage from a position they are not allowed to enter without a warrant or exigent circumstances. This is an unreasonable search protected by the Fourth Amendment because the defendant has an increased expectation of privacy in non-common areas of his property protected from view by the general public. The location of the officer when he observes inside the curtilage and his purpose for being there determine if an illegal search has been conducted.

Both parties cited *People v Houze*, 425 Mich 82; 387 NW2d 807 (1986), below. In *Houze*, the Supreme Court held that there was no search where the police were in a common area, an alley, saw a stripped down car in the alley, proceeded down the alley and observed a car being stripped down in the defendant's garage. The Court concluded that the police were in an area of the property open to the public and there was thus no heightened expectation of privacy. *Id.* at 86.

The prosecution's response to defendant's motion acknowledged that the officers were within the curtilage of defendant's trailer when they observed the marijuana plant, also within the curtilage. The prosecution maintained, however, that the officers had not conducted a "search," and thus had not interfered with defendant's expectation of privacy, because they went to defendant's property on a "knock and talk" mission, and because the marijuana plant was in plain view, i.e., defendant had made no attempt to hide the plant. In addition to *Houze, supra,* the prosecution cited *People v Shankle*, 227 Mich App 690; 577 NW2d 471 (1998), in which this Court held that entry onto the defendant's driveway to ask him questions did not constitute a search under the Fourth Amendment because the defendant had no reasonable expectation of privacy in an area commonly used by solicitors, drivers wanting to reverse direction, and other individuals. The *Shankle* Court noted: "Merely entering the private property of another is not an offense unless one has been forbidden to do so or refuses to depart after having been told to do so by a proper person." 227 Mich App at 694.

The circuit court denied defendant's motion to suppress.

LaFave, 1 Search & Seizure, Residential Premises, § 2.3(f), pp 504-509, states in pertinent part:

(f) Entry of adjoining lands. Certain lands adjacent to a dwelling called the "curtilage" have always been viewed as falling within the coverage of the Fourth Amendment. This is still the case under the approach to Fourth Amendment issues adopted by the Supreme Court in *Katz v. United States*[, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967)]. . . .

But under the *Katz* approach, certain observations (albeit not into the residence or some other structure) made while the police are within the curtilage are covered by the Fourth Amendment, while some others are not, depending upon whether there was an intrusion upon a justified expectation of privacy. In making that judgment, perhaps the most important consideration is precisely where on the adjacent lands the police were positioned. This is because *a portion of the curtilage, being the normal route of access for anyone visiting the premises, is "only a semi-private area."* As elaborated in *State v. Corbett*[, 15 Or App 470; 516 P2d 487 (1973)]:

> People commonly have different expectations, whether considered or not, for the access areas of their premises than they do for more secluded areas. Thus, we do not place things of a private nature on our front porches that we may very well entrust to the seclusion of a backyard, patio or deck. In the course of urban life, we have come to expect various members of the public to enter upon such a driveway, e.g., brush salesmen, newspaper boys, postmen, Girl Scout cookie sellers, distressed motorists, neighbors, friends. Any one of them may be reasonably expected to report observations of criminal activity to the police * * * . If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that police will do so.

Thus, when the police come on to private property to conduct an investigation or for some other legitimate purpose *and restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment. But other portions of the lands adjoining the residence are protected, and thus if the police go upon these other portions and make observations there, this amounts to a Fourth Amendment search* . . . (However, legitimate police business may occasionally take officers to parts of the premises not ordinarily used by visitors.) [A footnote here (202) states:

> The cases upholding such police activity do not necessarily make it clear whether such action is deemed to be no search or a reasonable search. See, e.g., *Brenneman v. State*, 264 Ark. 460, 573 S.W.2d 47 (1978) (where officer seeking to serve traffic citation on defendant received no answer at door but *saw defendant's car parked nearby*, he properly went to rear of premises to see if defendant "was on the premises, but perhaps outside the house"); *State v. Hider*, 649 A.2d 14 (Me. 1994)

> (officer tracking thief from airport with tracking dog lawfully entered rear of defendant's curtilage; *State v. Curtin*, 175 W.Va. 318, 332 S.E.2d 619 (W.Va. 1985) (police properly in yard at rear of house to secure premises while others executed search warrant within).]

[Emphasis added.]

The 2002 supplement adds to this footnote the following:

> See, e.g., *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998) (where police responding to 911 call re underage drinking party approached front door to notify residents of complaint but, seeing sign reading "Party In Back," walked around house to back yard where party going on and asked to see hose, such entry "did not exceed their legitimate purpose for being there" and thus "satisfied the Fourth Amendment's reasonableness requirement").

Shankle, *supra*, relied on in part by the trial court is not on point. There, this Court held that police entry on to an unsecured driveway did not violate the Fourth Amendment.

The police in the instant case did much more than enter defendant's driveway, and they did not relegate their presence to the "normal route of access for anyone visiting the premises." See LaFave, Search & Seizure, quoted *supra*. The testimony at the suppression hearing was that the area the officers walked through during which they observed the marijuana plant was unmowed, had no pathways, and was overgrown with vegetation. The officers knocked on the front door of the small trailer for two minutes and received no response. While it was a nice day, there was no indication that anyone was home; the only car present was up on blocks in a state of disuse. It was three o'clock in the afternoon on a Thursday, and police observed no activity outside when approaching. Even if the police properly did a cursory search for defendant outside, that did not necessitate them walking through an unmowed, overgrown pathless area not open to public view. The back door of the trailer had a deck, but no steps. The land around the westerly and north sides of the trailer was left "wild." While the south side, the officers' initial path, was also weedy, it was not as overgrown as the north side. The officers testified that the marijuana plant was not visible from defendant's driveway, from the public road, from the front door area, or from the back door and deck area. Under these circumstances, I conclude that defendant had a reasonable expectation of privacy in the specific area of the curtilage of his home involved here, which was hidden from public view, in a pathless, overgrown area, and not in one of the "semi-private" areas referred to by LaFave, quoted *supra*.

I would reverse.

/s/ Helene N. White